Supreme Court, U.S.
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No. 95-

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

KENNETH W. NELSON
RETA M. NELSON
CAROL MILSAPP
DIANA CATER
Petitioners,

vs.

UNITED STATES OF AMERICA
MICHAEL BROWN
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI AND APPENDIX

WILLIAM P. KOONTZ, ESQ.
811 EAST MAIN, SUITE E
COTTAGE GROVE, OR 97424
(503) 942 2984
Attorney for Petitioners

43 pp

QUESTION PRESENTED

Petitioners respectfully seek this Honorable Court issue a Writ of Certiorari, and review the judgment and order of the United States District Court for the District of Nevada and the United States Circuit Court of Appeals for the Ninth Circuit. Petitioners assert that the determination of both of the courts below has created a rule of law which effectively deprives a married woman in the community property state of Nevada of her interest in community property without just compensation in violation of the fifth and fourteenth amendments of the United States constitutuion. In the circumstance sought for review herein, the United States, acting through the Internal Revenue Service, assessed separate tax debts against Kenneth Nelson and Reta Nelson and then proceeded to collect same by levy and distraint. The United States collected the entire amount of debt owed by Petitioner Reta Nelson prior to the sale of the family home, located in

Winnemucca, Nevada applying the proceeds against the separate debt assessed against Petitioner Kenneth Nelson. Petitioner Reta Nelson never consented to said sale nor received compensation for her interest therein. After a District Court trial affirmed the sale, Petitioners appealed and the case was remanded to the District Court to determine the character of the property and decide whether that had any effect on the sale. The District Court determined the property to be community property and upheld the sale, holding that Ms. Nelson's interest in subject property could be applied the the separate tax debt of Petitioner Kenneth Nelson. The Ninth Circuit Court of Appeals affirmed the decision of the District Court. The question presented is whether due process and equal protection afforded by the United States Constitution allows the confiscation of a non liable spouse's property interest in a community property state to satisfy the tax obligation of a delinquent spouse, when the applicable statute

specifically limits the right of both spouses to no more than one half of the community property, and the federal levy statute specifically provides that only the taxpayer's property or rights to property may be levied upon and sold. Further, if the non delinquent spouse's interest in said property is sold, does due process require that she be compensated for the loss of her interest therein?

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JUDGMENTS AND ORDERS BELOW

The decision of the United States Court of Appeals for the Tenth Circuit appears in Appendix A to this Petition. The findings of fact of the United States District Court for the District of Nevada appears in Appendix B of this Petition. The Final Order of the United States District Court for the District of Nevada appears in Appendix C of this Petition.

JURISDICTION

In October of 1989, the United States of America seized and sold certain real property located in Winnemucca Nevada to satisfy separate tax obligations of Plaintiff Kenneth W. Nelson and Reta M. Nelson. Said property was sold to Defendant Michael P. Brown. Plaintiff's initiated suit under 26 USC Section 7426 (wrongful levy) and 28 USC Section 2410 (quiet title). During the initial trial, the Court found that the Nelson's had fraudulently conveyed the property to their adult daughters, Carol Millsap and Diana Cater and that it was lawful for the United States to seize and sell the property. On

appeal to the Court of Appeals for the Ninth Circuit, the case was remanded back to the District Court to determine the character of the property and whether the government could properly reach Ms. Nelson's share of the property to satisfy the tax liability of Mr. Nelson. Findings of fact were made by the District Court on February 19, 1993, (Appendix B) and a final order was entered on February 22, 1993, (Appendix C). A Notice of Appeal was filed March 15,, 1993. The Court of Appeals affirmed the decision of the District Court in its decision of May 1, 1995 set forth in Appendix A. Therefore the jurisdiction of this Honorable Court is properly invoked pursuant to 28 USC Section 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

AMENDMENT V

The Fifth Amendment to the United States Constitution provides in pertinent part:

> ....[N]or be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT XIV

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> ....No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of its laws.

STATUTES

26 USC SECTION 6331 (b)

Title 26 USC Section 6331 (b) provides:

(b) SEIZURE AND SALE OF PROPERTY.--The term "levy" as used in this title includes the power of distraint and seizure by any means. Except as otherwise provided in subsection (e), a levy shall extend only to property possessed and obligations existing at the time thereof. In any case in which the Secretary may levy upon property or rights to property he may seize and sell such property or rights to property (whether real or personal, tangible or intangible).

26 USC Section 7426 (a) (1)

26 USC Section 7426 (a) (1) provides:

(a) Actions permitted.--

(1) Wrongful Levy.--If a levy has been made on property or property has been sold pursuant to a levy,

any person (other than the person against whom is assessed the tax out of which such levy arose) who claims an interest in or lien on such property and that such property was wrongfully levied upon may bring a civil action against the United States in a district court of the United States. Such action may be brought without regard to whether such property has been surrendered to or sold by the Secretary.

28 USC SECTION 2410 (a)

28 USC Section 2410 (a) provides:

(a) Under the conditions prescribed in this section and section 1444 of this title for the protection of the United States, the United States may be named a party in any civil action or suit in any district court, or in any state court having jurisdiction of the subject matter---

(1) to quiet title to,

(2) to foreclose a mortgage or other lien upon,

(3) to partition,

(4) to condemn, or

(5) of interpleader or in the nature of interpleader with respect to, real or personal property on which the United States has or claims a mortgage or other lien.

NEVADA REVISED STATUTE 123.050

Husband or wife not liable for debts of the other incurred before marriage

NRS 123.050 provides as follows:

Neither the separate property of a spouse nor his share of the community property is liable for the debts of the other spouse contracted before the marriage.

NEVADA REVISED STATUTE 123.090

Necessaries provided wife when husband neglects to provide; recovery of value.

NRS 123.090 provides as follows:

If the husband neglects to make adequate provision

for the support of his wife, any other person may in good faith supply her with articles necessary for her support, and recover the reasonable value thereof from the husband. The separate property of the husband is liable for the cost of such necessities if the community property of the spouses is not sufficient to satisfy such debt.

NEVADA REVISED STATUTE 123.110

When wife must support husband.

NRS 123.110 provides as follows:

The wife must support the husband out of her separate property when he has no separate property and they have no community property and he from infirmity is not able or competent to support himself.

NEVADA REVISED STATUTE 123.220

Community property defined.

NRS 123.220 provides as follows:

All property, other than that stated in NRS 123.130,

acquired after marriage by either husband or wife or both is community property unless otherwise provided by:

1. An agreement is writing between the spouses, which is effective only as between them.

2. A decree of separate maintenance issued by a court of competent jurisdiction.

3. NRS 123.190

4. A decree issued or agreement is writing entered pursuant to NRS 123.259

NEVADA REVISED STATUTE 123.225

Interest of husband and wife in community property are present , existing and equal interests.

Nevada Revised Statute 123.225 provides:

1. The respective interests of the husband and wife in community property during the continuance of the marriage are present, existing and equal interests, subject to the provisions of NRS 123.230.

2. The provisions of this section apply to all community property whether acquired prior or subsequent to March 26, 1959

NEVADA REVISED STATUTE 123.230

Control of Community Property

NRS 123.230 provides:

A spouse may, by written power of attorney, give to the other the complete power to sell, convey or encumber any property held as community property or either spouse, acting alone, may manage and control community property, whether acquired before or after July 1, 1975, with the same power of disposition as the acting spouse has over his separate property, except that:

1. Neither spouse may devise or bequeath more than one-half of the community property.

2. Neither spouse may make a gift of community property without the express or implied consent of

the other.

3. Neither spouse may sell, convey or encumber the community real property unless both join in the execution of the deed or other instrument by which the real property is sold, conveyed or encumbered, and the deed or other instrument must be acknowledge by both.

4. Neither spouse may purchase or contract to purchase community real property unless both join in the transaction of purchase or in the execution of the contract to purchase.

5.Neither spouse may create a security interest, other than a purchase money security interest as defined in NRS 104.9107, in or sell, community household goods furnishings, or appliances unless both join in executing the security agreement or contract of sale, if any.

6. Neither spouse may acquire, purchase, sell, convey or encumber the assets, including real property and

goodwill, of a business where both spouses participate in its management without the consent of the other. If only one spouse participates in the management, he may, in the ordinary course of business, acquire, purchase, sell, convey or encumber the assets, including real property and goodwill, of the business without the consent of the nonparticipating spouse.

NEVADA REVISED STATUTE 123.250

Ownership of survivor upon death of spouse; disposal by decedents will.

Nevada Revised Statute 123.250 provides:

1. Upon the death of either husband or wife:

(a) An undivided one-half interest in the community property is the property of the surviving spouse and his or her sole separate property.

(b) The remaining interest is subject to the testamentary disposition of the decedent, in the absence thereof goes, except as provided in NRS

134.007, to the surviving spouse, and is the only portion subject to administration under the provisions of Title 12 of NRS.

STATEMENT OF THE CASE AND BASIS FOR FEDERAL JURISDICTION

The Petitioners cause of action arose as a result of two levies upon certain real property located in Winnemucca Nevada.. Individual levies for separate tax debts were issued on July 31, 1989 against Petitioner Reta M. Nelson in the amount of $2310.96 and against Kenneth W. Nelson in the amount of $73,506.89. Individual Notices of Seizure were issued on August 22, 1989 in the identical dollar amounts. On October 24, 1989, the property was sold to Michael P. Brown. Plaintiffs initiated their lawsuit on October 20, 1989, utilizing the jurisdictional basis of 26 USC Section 7426 (a) (wrongful levy) and 28 USC Section 2410 (a) (quiet title). Petitioner Reta M. Nelson had completely satisfied all

obligations due and owing to the United States by April 7, 1989, a period of exceeding six months, before the United States seized and sold the property in question. In September 1990, the case was tried to the Court, the Honorable Bruce Thompson (now deceased) presiding.The Court found that Mr. and Mrs. Nelson had made a fraudulent conveyance of their property to their adult daughters, Carol Millsap and Diana Cater. Further, that the title to the property should be quieted in the Defendant Michael Brown. That decision was appealed to the Court of Appeals for the Ninth Circuit which remanded the case to the district court to determine the exact nature of the property in question and to determine whether the Government could properly reach Ms. Nelson's share of the property in order to satisfy Mr. Nelson's tax liability.

On remand, the district court determined that the property in question was community property, and as such that the whole of the property was subject to being applied to Mr. Nelson's tax liability in derogation of Ms. Nelson's

interest, relying on Randona v Turk, 86 Nev 123, 466 P 2d 218 (Nev Sup Ct. 1970) A copy of the district court's findings of facts and law appears at Appendix B. The district court and the Court of Appeals for the Ninth Circuit found that Nevada law under the auspices of Randona, supra permitted the wife's share of the community property to be utilized to satisfy the husband's individual tax debt. There are two specific Nevada statutes that allow the community property to be utilized for a separate debt of one of the partners. Those statutes are NRS 123.090, which provides the community is accountable for necessaries provided to the wife when the husband does not provide them, and NRS 123.110, which provides that wife must support the husband from her own separate property if there is no community property and the husband is unable to support himself. There are no other statutes that address the question of utilizing the interest of one of the members of the community to satisfy the separate debt of the other partner.

The Court of Appeals for the Ninth Circuit stated that this silence on the part of the Nevada statutes meant that it was permissible to take the property of the non owing spouse to satisfy separate debt of the other spouse. The Court of Appeals went on to note that the premise of Nevada law was that a debt incurred during marriage by either spouse can be collected from the entirety of the community property without regard to which spouse incurred the debt.

REASONS FOR GRANTING THE WRIT

Petitioners respectfully suggest this Court should grant Certiorari for the following reasons.

THE APPELLATE COURT'S DECISION HAS CREATED A CIRCUMSTANCE WHEREIN MARRIED WOMEN WITHIN THE STATE OF NEVADA HAVE HAD THEIR RIGHTS TO PROPERTY OWNERSHIP SEVERELY IMPAIRED, BASED SOLELY ON GENDER, AND HAVE EFFECTIVELY BEEN DENIED EQUAL PROTECTION OF LAW AS WELL AS

HAVING THEIR PROPERTY TAKEN FROM THEM WITHOUT JUST COMPENSATION THEREFORE IN DENIAL OF THEIR DUE PROCESS RIGHTS

The Petitioners respectfully request this Honorable Supreme Court to grant Certiorari to review the status of married women within the State of Nevada and how the United States intends to treat them with respect to their property rights under the Nevada community property law. The substantive issue is whether the United States is entitled to confiscate a Nevada married woman's interest in community property to satisfy the separate tax debt of her husband. The appellate court has so far departed from the accepted and usual course of judicial proceedings as to require supervision by this Honorable Court. Specifically the appellate court has found law sufficient to justify the confiscation of a person's property without compensation when in fact no such law exists, relying on case law which has been specifically invalidated by statute.

The district court as well as the appellate court fell into a quagmire by relying on the case of Randona v Turk, supra to justify taking Ms. Nelson's portion of the community property to satisfy the separate tax obligation of Kenneth Nelson. Randona supra, was decided in 1970. When the Nevada Supreme Court decided that case, NRS 123.230 gave the husband the "entire management and control of community property with the like absolute disposition thereof", Randona, supra at 224. Husband had a right of absolute control of the community property. When interfaced with 26 USC 6331 (b) which specifically provides that the United States can levy upon a person's property and rights thereto, Randono, supra led to the result postulated by the appellate court in the instant case. The appellate court erred when it failed to consider NRS 123.230 as amended in 1977. That amendment cancelled husband's entire right to management and control of the community property, and replaced it with the concept that both spouses had equal

rights in the community property. Each spouse had to participate in the sale, encumbrance, or conveyance of community property. Thus there were equal management powers, and with that shift in the balance of power, wherein husband no longer had absolute authority over the disposition of community property, 26 USC 6331 can no longer be applied to reach the wife's share of the community property to satisfy her husband's separate tax debt. At best husband can only dispose of one half of the community property under NRS 123.250. Thus the United States could only take one half of the community property in the instant case.

If this Court allows the decision in the appellate court to stand, it tells married women in Nevada that they are second class citizens who are apparently not competent to manage their own affairs, but rather must be under the guidance and control of their husband. That was the status of the law at the time Randona, supra was decided in 1970. However, the Nevada legislature changed the law in 1977 and

specifically recognized that married women in Nevada had equal rights to the control of the community property by modifying NRS 123.230 to so state. The appellate court decision seeks to turn back the clock, ignoring the basic precept that women have rights and are capable of independent thought and action.

The appellate court's assertion that it is a non-sequitur that the acting spouse cannot subject the non-acting spouse's community property to the acting spouse's debt is simply wrong. NRS 123.230 specifically forbids spouses from encumbering, selling or conveying real property without the consent of the other spouse. The appellate court reasoned that debts incurred during the marriage are community debts and thus the whole of the community is liable. Again, the appellate court is wrong. Plaintiff Kenneth Nelson had a separate debt owing to the United States and did Plaintiff Reta Nelson. An income tax debt is not automatically a community debt because the parties live in a community property state.

Redfield v U.S, 315 F.2d 76 (9th Cir. 1963) recognized this right to segregate incomes for tax purposes. In the case at hand, separate assessments were made against Plaintiff Kenneth Nelson and Plaintiff Reta Nelson. The tax debts were separate debts. Yet the appellate court would have the woman forfeit her property interest in the community to satisfy the separate tax debt of the husband, based on a case, Randano, supra, whose very premise was that the husband had the entire right to the management and control of the community and absolute disposition thereof, thus the community property was liable for his debts.

The appellate courts' concern that respecting the rights of the non-acting spouse would destroy the community property system and turn each spouse into an independent actor is simply not well founded. Nevada allows spouses the right to make unlimited testamentary disposition of their share of the community property. NRS 123.250. As a practical matter each spouse in an independent actor.

Essentially the appellate court would take Ms. Nelson's interest in community property established by NRS 123.225, sell it off, and put the money in the public coffers under the guise of paying off Mr. Nelson's separate tax debt, and then give no compensation to Ms. Nelson for the taking of her property. The Fifth Amendment of the United States Constitution specifically forbids such an act.

The Appellate Court held that state law justifies such a taking. The appellate court reasoned that because NRS 123.050 provides that the share of the community property owned by the non-acting spouse's interest cannot be reached by a creditor whose claim arose before the marriage, this somehow confirms the notion that the non-acting spouse's interest can be reached for debts incurred by the acting spouse after marriage. Nevada has no statutes that authorize that assertion made by the appellate court. The only basis for that proposition comes from the Randono supra, case which relied on law wherein the husband was the entire manager of the

community with rights to absolute disposition thereof. That is no longer the case under NRS 123.230. The Court of Appeals for the Ninth Circuit previously decided cases arising out of Washington, U.S. v Overman, 424 F2d 1142 (9th Cir. 1970) and Arizona, In Re Ackerman,, 424 F2d 1148 (9th Cir. 1970) that recognize the property rights of the non actor spouse. In each of those cases state law provided that spouses had a vested undivided one half interest in the community, and that under federal income tax law each spouse might file a separate tax return and that the community is generally immune from the general creditors of either spouse for antenuptial debts. These conditions are the exact parallel of Nevada law as it presently exists. In Overman, supra and Ackerman, supra, the court decided that the Government could file and enforce liens on the actor spouse but only to the extent of the husband's interest. Logically, that is what should happen in the instant case.

CONCLUSION

26 USC 6331 (b) is not an unlimited grant of authority that allows the government to seize and sell private property for tax debts. On its face it is limited to property owned by the taxpayer or rights to property. Mr. Nelson is the taxpayer. Under NRS 123.225 he has present, existing and equal rights to that property with his spouse. However, he cannot dispose of, encumber, convey or do anything else with that property under the terms of NRS 123.230, without the consent and signature of his spouse. The only thing he can do with his share is to bequeath it, under the terms of NRS 123.250, and then he is limited to one half of the community property. Clearly Mr. Nelson only has the right to exert a limited amount of control over 50% of the community property. To give the government a far greater share of the property than he is legally entitled to, without compensating the other owner therefore is illegal and illogical and an egregious violation of Ms. Nelson's civil rights under the United States Constitution. The government wants to take

Ms. Nelson's property without giving her any compensation therefore and has justified it on the suspect basis that she is a woman who's husband has the rights to control and dispose of all the respective community property. Nevada's statutes don't read that way and most definitely should not be construed in that fashion. It is appropriate to issue a Writ of Certiorari to review the judgment of the Ninth Circuit Court of Appeals.

Respectfully submitted,

William P. Koontz Esq.
811 East Main Street, Suite E
Cottage Grove, Oregon 97424
Telephone (503) 942 2984
Fax (503) 942 5450
Counsel for Petitioners.

APPENDIX

APPENDIX A-1

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 93-15491

KENNETH W. NELSON, RETA M. NELSON

CAROL MILSAPP, DIANA CATER

Petitioners

v.

UNITED STATES OF AMERICA,

MICHAEL P. BROWN

Respondent-Appellees

APPEAL FROM THE UNITED STATES DISTRICT

COURT FOR THE DISTRICT OF NEVADA

(D.C. NO CV-89-00659-HDM)

Before WALLACE, Chief Judge, and GOODWIN and

FLETCHER, Circuit Judges.

APPENDIX A-2

The Nelsons and their daughters appeal for the second time the district court's holding that the Internal Revenue Service could levy upon and sell the real property originally held in joint tenancy by the Nelsons and apply the entire proceeds to the payment of taxes owed by Kenneth W. Nelson. We affirm.

We previously remanded for a determination as to whether the property was held in joint tenancy or as community property since the record was not adequately developed on that point. Upon retrial extensive evidence was taken.

After trial the district court concluded based upon the record as developed, that the Nelsons held the property as community property. Although they took title to the property in joint tenancy with right of survivorship, the source of the funds for the acquisition was community property. Subsequently the Nelsons filed a homestead declaration which stated that the property was their community property. The

record was also replete with evidence that community funds were used from time to time to improve the property. The district court had an adequate basis to find that any presumption that the property was joint tenancy property was overcome by these facts.

The district court was also correct in holding that the entire proceeds from the sale of the property could be used to pay Kenneth Nelson's tax liability. The Nelson's arguments to the contrary are entirely specious. They inexplicably rely on Randono v. Turk, 86 Nev. 123, 466 P. 2d 218 (Nev. Sup. Ct. 1970), a Nevada case decided at the time when the Nevada law provided that the husband had sole management of the entire community. Unremarkably, the court in that case held that the whole of the community could be subjected to the judgment of the debt incurred by the husband. Now that the wife, under the new statutory scheme, has equal management powers, appellants assert that the acting spouse cannot subject the non-acting spouse's community property to the acting

spouse's debt. This is a complete non-sequitur and antithetical to the whole scheme of community property. Although Nevada statutory law is not entirely explicit[1] on this point, it starts from the premise that a debt incurred during marriage by either spouse can be collected from the community property. It does not matter which spouse incurred the debt. It is a community debt and can be collected from the whole of the community, not just the actor's one-half.

If appellant's view were to prevail, the community property system would be destroyed. Each spouse would be an independent actor; each spouse could have a widely different interest from that of the other. Creditors, supposedly creditors of the community, could reach only the unexpended portion of the actor's community interest. In

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[1] N.R.S. 123.050 is explicit albeit in the negative. It provides that the share of the community property owned by the non-acting spouse's interest cannot be reached by a creditor whose claim arose before marriage. This confirms the notion that the non-acting spouse's interest can be reached for debts incurred by the acting spouse after marriage.

effect there would be no community. That is simply not the law of Nevada or any other community property state.

We affirm.

AFFIRMED

APPENDIX B-1

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEVADA

CASE No. CV-N-89-659-HDM

KENNETH W. NELSON, RETA M. NELSON
CAROL MILLSAP, and DIANA CATER,

Plaintiffs,

vs.

UNITED STATES OF AMERICA
and MICHAEL P. BROWN,

Defendants

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

This matter came before the Court for trial on remand from the Ninth Circuit Court of Appeals with respect to the narrow issues (i) whether the property in question was held by plaintiffs, Mr. and Ms. Nelson (the"Nelsons") as community property when it was seized by the Internal Revenue Service (the "IRS") and (ii) whether the entire community property

can be seized by the IRS to satisfy the tax liability of only Mr. Nelson. The Court, having considered the evidence presented at trial, the arguments of counsel, and the files and record in this case, enters the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1.On October 20 1989, Plaintiffs, Kenneth W. Nelson (Mr. Nelson), Reta M. Nelson (Ms. Nelson), Carol Millsap (Ms. Millsap) and Diana Cater (Ms. Cater), instituted the instant action pursuant to 27 USC section 7426 asserting that the IRS had improperly levied upon certain real property located at 4100 Turner Lane, Winnemucca, Nevada (the "Property') and seeking to quiet title to the Property in their names pursuant to 28 USC Section 2410.

2. On September 12, 1990, this Court (Judge Bruce R. Thompson (deceased)) found that the plaintiffs, Ms. Millsap and Ms Cater held the Property as the nominees of their parents, the Nelsons, and entered a judgment quieting title to

the Property in the name of Michael P. Brown. Among other findings, the Court found the following:

> Although the transfer of the property was effected shortly before the formal tax assessments by the Internal Revenue Service, Mr. and Mrs. NELSON knew the IRS did not accept their tax returns, and further knew they had tax liabilities owing to the Internal Revenue Service. The sole purpose for the transfer of the property from Mr. and Mrs. NELSON to their daughters, the Plaintiffs, DIANA CATER and RETA NELSON , was to prevent the Internal Revenue Service from seizing the property at 4100 Turner Lane to satisfy their tax liabilities.

This finding was affirmed on appeal and accordingly, it is the law of the case and incorporated herein.

3. The Nelsons, Ms. Millsap and Ms. Cater appealed from the judgment of this Court. On August 29, 1991, the Ninth Circuit Court of Appeals filed its opinion affirming that

decision that Ms. Millsap and Ms. Cater held the property as the nominees of the Nelsons. However, the Ninth Circuit remanded this action for further proceedings to determine whether the property was held by the Nelsons as joint tenants or as community property and whether the Government "could properly reach Ms. Nelson's share of property held in this manner to satisfy Mr. Nelson's tax liability."

4. The Nelsons were married on June 20, 1943.

5. The Nelsons rented the property in 1968 and have used the Property as their residence since this date.

6. In 1970, the Nelsons entered into a lease/purchase option with respect to the Property.

7. Subsequently, in 1973 or 1975, the Nelsons purchased the Property taking the deed as joint tenants. The Nelsons paid the purchase price of the Property over a number of years.

8. On October 28, 1981, the Nelsons executed a notarized Declaration of Homestead in which they stated that

the Property was the community property of Mr. and Ms. Nelson and that they resided on the premises. There was direct contact between the Nelsons and the attorney that drafted the Declaration of Homestead. Moreover, there is no evidence that the Declaration of Homestead was not prepared at the Nelsons' direction. The Court further finds that the Nelsons conferred with each other about the Declaration of Homestead before signing it. Mr. Nelson's testimony to the contrary that he and Mrs. Nelson did not confer about the Declaration of Homestead and that he did not understand that the Declaration stated that the Property was held as community property is not credible.

9. The Property was purchased and subsequently improved with community funds and labor. The Nelsons' income from the date the Property was acquired until it was seized by the IRS consisted of their wages, except for a small amount of income from the sale of real property. The wages were, for the most part, deposited in joint bank accounts held

in the name of the Nelsons. With respect to the improvements made on the Property, the Nelsons remodeled the home on the Property and built a fence on the Property often using the labor of Mr. Nelson to make such improvements.

10. On April 4, 1984, the Nelsons attempted to transfer the Property to their daughters, Ms. Millsap and Ms. Cater by deed. The deed executed by the Nelsons states that they held the property as joint tenants. However, this Court has already found that this purported conveyance was made for the purpose of avoiding the Nelsons' obligation to the IRS.

11. Pursuant to IRS levies, the property in question was sold at auction to Michael P. Brown for $25,000 on October 24, 1989.

12. Ms. Nelson had no outstanding tax liability just prior to the time that the Property was sold to Mr. Brown.

CONCLUSIONS OF LAW

1. The Court has jurisdiction over this cause of action pursuant to 26 USC Section 7426(a). United Sand & Gravel

Contractors, Inc. v. United States, 624 F.2d 733 (5th Cir. 1980).

2. 26 USC Section 6321 (herein referred to as the "Code") provides, in pertinent part, that "[i]f any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, additional amount, addition to tax, or assessable penalty***) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person."

3. In Nevada, where a deed to property owned by a husband and wife is taken in joint tenancy, a rebuttable presumption exists that the property is, in fact, held in joint tenancy. Peters v Peters, 557 P. 2d 713, 715, (1976); Neuman v McMillan, 629 P. 2d 1214 (1981).

4. However, it is also the law in Nevada that a transmutation from property held in joint tenancy by a husband and wife to community property may be established

by proof. Mullikin v Jones, 278 P. 2d 876 (1955). With respect to a transmutation, the determinative factor is whether it can be shown "that the property was acquired with the intent that it be held in a tenancy different from that indicated from the form of the deed, or that although acquired without such initial intent, it was later transmuted by agreement of the parties." Mullikin, 278 P. 2d at 884. In other words it is "the conduct, expressions or intent of the parties at the time of the taking or during the holding of the real property" that is relevant. Peters, 557 P. 2d at 716. See also, Graham v Graham, 760 P.2 at 773 (1988).

5. The Court finds that the Declaration of Homestead executed by the Nelsons stating that the Property was held as community property is an express manifestation of their intent to hold title to the Property as community property. This is further supported by the fact that the Property was both paid for and improved with the wages of Mr. and Mrs. Nelson during marriage which is community property. Nevada

Revised Statutes Section 123.220. Furthermore, the labor of Mr. Nelson was often used to make such improvements to the Property which also is a community asset. Id. The Court further finds that the later deed executed by the Nelsons in an attempt to avoid their tax obligation to the Government did not effect the Declaration of Homestead as this Court has found that the daughters held the Property as the nominees of their parents. Consequently, the Court finds that the Nelsons intended to hold the property as community property when it was seized by the Government.

6. The Court finds that the Property was held by the Nelsons as community property under Nevada law at the time that it was seized by the Government.

7. The postmarital debts of one spouse in Nevada can be satisfied from the entire community property of both spouses and the Government was correct in seizing and selling the Property and applying the entire proceeds towards the tax

liability of Mr. Nelson. See Randono v Turk, 86 Nev 123, 466 P.2d 218 (Nev Sup. Ct. 1970)

8. Any finding of fact found to be a conclusion of law shall be deemed to be a conclusion of law. Any conclusions of law found to be a finding of fact shall be deemed to be a findings of fact. (sic)

DATED this 19th day of February, 1993.

BY THE COURT:

HOWARD D. McKIBBEN, Judge

United States District Court

APPENDIX C-1

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEVADA

CASE NO CV-N-89-659-HDM

KENNETH W. NELSON ET AL.

v.

UNITED STATES, ET AL.

JUDGMENT IN A CIVIL CASE

[ ] Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

[x] Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

that title to the property at 4100 Turner Lane, Winnemucca, Nevada is quieted in the name of Michael P. Brown; and

that the plaintiffs take nothing and the Complaint and this action are hereby dismissed.

FEBRUARY 22, 1993 CAROL C. FITZGERALD
Date Clerk

R. MILLER
(By) Deputy Clerk